410.

SUPREME COURT OF THE UNITED STATES.

No. 131.

DUNCAN McARTHUR'S HEIRS, COMPLAINANTS,

vs.

WALTER DUN'S HEIRS.

CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT OF THE U. S. FOR OHIO.

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J. & G. S. Gideon, printers.

The UNITED STATES OF AMERICA,
District of Ohio, ss:

At a circuit court of the United States within and for the seventh circuit and district of Ohio, began and held at the city of Columbus, on the first Monday in the month of July, being the seventh day of the month, in the year of our Lord one thousand eight hundred and forty-five, and of the independence of the United States of America the 70th before the honorable John McLean and Humphrey H. Leavitt, judges of said court; among the proceedings had were the following, to wit:

ALLEN MCARTHUR and others, heirs of Duncan McArthur, dec'd, compl'ts, vs. The HEIRS of Walter Dun, deceased, defendants. } In chancery.

Be it remembered, that heretofore, to wit, on the twentieth day of December, being at the December term of said court, in the year of our Lord one thousand eight hundred and thirty-eight, on motion of Duncan McArthur, by Mr. Vinton, his counsel, the said Duncan McArthur has leave to file a bill of review upon a decree in chancery rendered at the July term of this court, A. D. 1836, wherein Walter Dun was complainant and the said Duncan McArthur was defendant; and thereupon the said Duncan McArthur filed his bill of review accordingly, in the words and figures following, to wit:

To the honorable the judges of the circuit court of the United States for the district of Ohio:

Duncan McArthur, a citizen of and resident in the State of Ohio, represents to your honors, that on or about the 20th day of July, A. D. 1834, one Walter Dun, then in full life, and a citizen of and resident in the State of Kentucky, filed his original bill in this court against your orator, setting forth, that on the 10th day of December, A. D. 1834, one James Galloway, jr., made, or caused to be made, on the books of the late Col. Richard C. Anderson, the surveyor of the Virginia army lands, the following entry: "No. 12,545. James Galloway, jr., assignee, entered 200 acres of land on part of a military warrant, No. 6,648, on the waters of Deer creek, beginning at the easterly corner of Joseph Swearingen's survey, No. 4,200; thence, N. 48 E., 160 poles, to the southerly corner of Huff and Taylor's survey, No. 3,726; thence, with their line, N. 42 W., and from the beginning, with the line of Swearingen's said survey, N. 42 W., so far that a line, N. 48 E., will include the quantity; and on the 15th day of December, 1824, caused a survey to be made on said entry, and in strict conformity thereto, and on the 4th day of April, 1825, obtained from the President of the United States a patent for said tract of two hundred acres of land,

which is situated in the county of Madison, in the State of Ohio. And the said Dun further alleged, that his entry was special, and in all things in conformity with the law; and that the said survey was made and executed in strict conformity with said entry, and that the said entry, survey, and patent was an appropriation of the said tract of land, and referred in his said bill to an attested copy of said entry, survey, and patent, and prayed that the same might be taken and considered as parts of said bill; that on the 28th of July, 1832, he received from James Galloway, jr., the patentee, a deed of conveyance for said tract of land; that at the time of said conveyance he held in trust for said Galloway one-half of the proceeds of said tract of land; that since that time he had purchased said Galloway's interest, and was then the bona fide owner of said tract of land, for a valuable consideration; to which deed, or an attested copy thereof, he referred, and prayed that the same might be taken as part of his petition.

Said Dun further stated, that your petitioner, the said Duncan McArthur, on the 3d of January, 1825, obtained from the President of the United States a patent for the said tract of land, founded on an entry made in the name of one Robert Means, assignee, on the 23d of November, A. D. 1822, and a survey made on said entry in the name of said Robert Means, assignee, on the 18th day of March, 1823, to a certified copy of which entry and survey the said Dun, in his said bill referred, and prayed that the same might be taken as part thereof. The said Dun, in his said bill, further stated, and expressly charged, that Robert Means, in whose name the said entry and survey was made, was not living, but had departed this life about the month of March, 1808; and insisted, that the entry made in his name after his decease was null and void, and that the patent obtained on said entry and survey was fraudulently procured; and that the land aforesaid was not *appriated* thereby. The said Dun further alleged, that he had a complete equitable title to said tract of land, and that the elder legal title thus erroneously and fraudulently obtained by the said McArthur was in him, the said McArthur. The said Walter Dun, in consideration of the premises by him therein stated, prayed that the said Duncan McArthur might be made defendant to said bill of complaint, and that your honors would, by your decree, annul the legal title obtained by the said McArthur for said tract of land; or, that your honors would order and decree, that the said McArthur should convey to him, the said Walter Dun, all the right and title to the said tract of land which he acquired by the patent issued to him; and that your honors would grant such other and further relief as might be consonant to equity and justice, and would meet the case of the said petitioner.

And afterwards, viz., on the 15th day of December, A. D. 1834, the said Duncan McArthur, by his solicitor, filed his demurrer to the said bill in chancery, and for cause of demurrer shewed, that the said Walter Dun, by his said bill, had not made such a case as entitled him, in a court of equity, to any relief against him, the said Duncan McArthur; wherefore, and for other good causes, the said Duncan McArthur de-

murred to the said bill, and prayed the judgment of the court, and to be hence dismissed with his reasonable costs, &c.

And afterwards, viz., on the said 15th day of December, 1834, the said Walter Dun, by Creighton and Bond, his solicitors, filed *their* joinder in said demurrer.

And afterwards, at the July term, 1835, the said cause coming on for argument on the said bill and demurrer, and the same being argued by counsel for plaintiff and defendant, the said court did, on full consideration, overrule and disallow said demurrer to be a good and sufficient defence in law to the said bill of complaint, and leave was thereupon given to the said Duncan to file his answer in 60 days from the rising of the then term of said court.

And the said Duncan McArthur having failed to plead or answer said bill within the time allowed him by said court, afterwards, at the July term, 1836, the said court, on motion of the complainant's counsel, did order, adjudge, and decree, that the said entry, in the name of the said Robert Means, assignee, made on the 23d of November, 1822, and the survey made thereon, in the name of the said Means, assignee, on the 18th of March, 1823, and the patent issued to the said McArthur, founded on said entry and survey, are null and void, for the reason, that at the time of said entry and survey the said Robert Means was deceased; and it was further ordered and decreed, that the said McArthur, his heirs and assigns, be perpetually enjoined from setting up the said entry or patent, or any record thereof, against the said complainant, his heirs and assigns.

It was further ordered and decreed, that the said Duncan McArthur should, within thirty days from the rising of said court at its then present term, release to the said Walter Dun all his interest and title to the 200 acres of land in the said bill mentioned, acquired under said entry, survey, and patent to him, the said McArthur; and in case of his failure to do so, that said decree should operate and inure as and for such release; and the said Duncan McArthur was further ordered and decreed to pay the costs of this suit.

And your orator states and shews to your honors, that since the rendition of said decree, some time on or about the first day of January, A. D. 1838, the said Walter Dun departed this life, leaving the following children his sole and only heirs-at-law, to wit: Mary A. Tompkins, John G. Dun, James Dun, all being of lawful age, and the said Mary A. Tompkins being a single woman, and Walter A. Dun, and Robert G. Dun, both being infants under the age of twenty-one years, and all of said children being citizens of and residents in the State of Kentucky, and whom your orator prays may be made defendants to this his bill of review; and that the said infant defendants may appear and defend, by their guardian ad litem, to be appointed by this honorable court.

And your orator avers, that he is aggrieved by the said proceedings and decree, and ought not to be bound thereby; and that the said decree is erroneous, and ought to be reversed; and your orator, according to the course of this court for causes of error, assigns the following, viz:

1st. Your orator says, that the said entry and survey in name of Robert Means, and the patent issued thereon, were good and valid in law, and vested the legal and equitable title to said land in the said Duncan McArthur, and that it was error in said decree to pronounce the same to be null and void.

2nd. Your orator further says, there was error in said decree in perpetually enjoining the said Duncan McArthur from setting up the said entry or patent against the said Walter Dun, his heirs or assigns.

3rd. Your orator further says, there was error in said decree in ordering and decreeing that the said McArthur should, within the time therein specified, convey the said land to the said Walter Dun; and in case of his failure to do so, that the said decree should stand as and for a conveyance thereof.

4th. Your orator further says, there was error in decreeing that the said Duncan McArthur should pay the costs of that suit.

For all which errors and imperfections, your orator has brought this his bill of review, and conceives that he should be relieved therein. Your orator therefore prays that a writ of subpœna may be issued against the said Mary A. Tompkins, John G. Dun, James Dun, Walter A. Dun, and Robert G. Dun, that they may be compelled to answer all and singular the premises, that the said proceedings and decree may be reviewed and reversed, and that your orator may be relieved in all and singular the premises, according to equity and good conscience; and, as in duty bound, will ever pray, &c.

SAM'L F. VINTON and
B. G. LEONARD,
Solicitors for complainants.

And *the* on like motion of the complainants, it is ordered, that a subpœna issue to the marshal of this district, agreeably to the prayer of the said bill, and that notice of the pendency of this suit, and of the substance of the bill, and prayer thereof, be published for six consecutive weeks in the Ohio Statesman newspaper, previous to the next term of this court, until which time this cause is continued.

And afterwards, to wit, on the 27th day of April, anno domini eighteen hundred and thirty-nine, the following subpœna issued herein, to wit:

UNITED STATES OF AMERICA, *district of Ohio, ss:*

To the marshal of said district, greeting:

We command you to summon Mary A. Tompkins, John G. Dun, James Dun, Robert G. Dun, and Walter A. Dun, (Robert G. and Walter A. being minors under the age of 21 years,) if they be found in your bailiwick, to appear before the judges of the 7th circuit court of the United States for the district of Ohio aforesaid, at Columbus, on the first Monday in the month of July next, to answer a bill of review exhibited against them in said court by Duncan McArthur; and this they shall in nowise omit, under the penalty of the law; and have then there this writ.

Witness the honorable Roger B. Taney, chief justice of the United [L. S] States, this 27th day of April, 1839, and in the 63d year of the independence of the United States of America.

Attest: WM. MINOR, *Clerk*.

Upon which said subpœna the marshal made the following return, to wit:

"The within named defendants not found in my bailiwick. April 30th, 1839.

"JOHN PATTERSON,
Marshal dist. O."

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and thirty-nine, this cause was continued.

And afterwards, to wit, at the December term of said court, in the year of our Lord one thousand eight hundred and thirty-nine, by consent, Allen C. McArthur, James McArthur, Effie Coons, William M. Anderson, and Eliza, his wife, Cary A. Trimble, and Mary, his wife, John Walk, and Francis, his wife, and John A. Kercheval, heirs of Duncan McArthur, deceased, are made parties to this suit, and this cause is continued.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and forty, this cause was continued, with leave to plead, answer, or demur, within ninety days.

And afterwards, to wit, on the first day of September, in the year last aforesaid, came the defendants, Mary A. Tompkins, John G. Dun, and James Dun, by W. Creighton, jr., esq., their solicitor, and filed in the clerk's office of said court their demurrer to the said bill of review, in the words and figures following, to wit:

"The demurrer of Mary A. Tompkins, John G. Dun, and James Dun, to the bill of review exhibited against them and others in the circuit court of the United States for the seventh circuit and district of Ohio, by one Duncan McArthur, and since revived in the names of his heirs.

These defendants, by protestation, not confessing all or any of the matters and things in the said complainant's bill contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, do demur in law thereto, and for cause of demurrer shew, that there are no errors in the record and premises, and in the decree made therein at the said July term, A. D. 1836, of said circuit court, in said bill of review mentioned; nor is there any sufficient matter alleged in said bill of review to entitle the said complainants to reverse the said decree; and for divers other errors and defects appearing in the said bill of review, these defendants do demur in law thereto, and humbly pray the judgment of the court whether they ought to be compelled to put in any further or other answer to the same; and pray to be hence dismissed, with their reasonable costs in this behalf sustained.

WM. CREIGHTON, Jr.,
Solicitor for defendants.

And afterwards, to wit, at the December term of said court, in the year last aforesaid, came Mr. Vinton, counsel for the complainants, and suggests the death of James McArthur, and the following minor children and heirs-at-law of said James McArthur, are made complainants in his stead, to wit, Duncan McArthur, Smith McArthur, Nancy McArthur, and William H. H. McArthur; and thereupon appeared John Medary, their next friend, to prosecute this suit in their behalf. And afterwards, at the term of December last aforesaid, the following proceedings were had herein, to wit:

"In this case the bill and demurrer being filed, the cause was argued by counsel, and on the point, whether there was error in the decree sought to be opened up and set aside, on the ground that the original entry of Robert Means was made after his death, on which the survey was made, and the patent issued, the judges were opposed in opinion; and, on motion of the complainants, the point is certified under the act of Congress, and this cause was continued.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and forty-one, this cause was continued.

And afterwards, to wit, at the December term of said court, in the year last aforesaid, this cause was continued.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and forty-two, this cause was continued.

And afterwards, to wit, at the December term of said court, in the year last aforesaid, this cause was continued.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and forty-three, this cause was continued.

And afterwards, to wit, at the December term of said court, in the year last aforesaid, this cause was continued.

And afterwards, to wit, at the July term of said court, in the year of our Lord one thousand eight hundred and forty-four, came Thomas Ewing, esq., one of the attorneys of this court, and produced in court here the mandate of the Supreme Court of the United States, which mandate is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America.

To the honorable the judges of the circuit court of the United States [L. S.] for the district of Ohio, greeting:

Whereas, lately, in the circuit court of the United States for the district of Ohio, before you, in a cause between Allen McArthur and others, heirs, &c., of Duncan McArthur, deceased, complainants, and the heirs of Walter Dun, deceased, defendants, wherein the judges were opposed in opinion on a certain point or question, which was cer-

tified under the seal of the said circuit court to the Supreme Court of the United States for its opinion, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States, agreeably to the act of Congress in such case made and provided, fully and at large appears. And whereas, at the present term of January, in the year of our Lord one thousand eight hundred and forty-two, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel; on consideration whereof, and it appearing to this court, upon examining the record in this case, that a material error has been committed by the clerk in stating the point intended to be certified, it is thereupon now here ordered and decreed by this court, that this cause be, and the same is hereby, remanded to the said circuit court, for such further order as the said circuit court may deem right,

March 12th.

You, therefore, are hereby commanded, that such further proceedings be had in said cause as, according to right and justice, and the laws of the United States, ought to be had, the said certificate notwithstanding.

Witness the honorable Roger B. Taney, chief justice of said Supreme Court, the second Monday of January, in the year of our Lord one thousand eight hundred and forty-two.

WM. THOS. CARROLL,
Clerk of the Supreme Court of the United States.

And thereupon this cause was continued.

And afterwards, to wit, at the December term of said court, in the year of our Lord eighteen hundred and forty-four, this cause was continued; and now, at the present term of July of our said circuit court, in the year of our Lord eighteen hundred and forty-five, the following proceedings were had in this cause, to wit:

"This cause having been remanded from the Supreme Court of the United States to this court, for a further order touching the point upon which the opinions of the judges of this court upon the hearing thereof were opposed, in compliance with said mandate of said Supreme Court, the said point of disagreement of said judges is now ordered to be restated more specially and at large. The said point of disagreement arose out of the following facts, stated and set forth in the original bill of said Walter Dun, and admitted to be true by the demurrer of said Duncan McArthur thereto, who was the respondent to said original bill, viz: That said McArthur, on the 3d of January, A. D. 1825, obtained a patent for the tract of land in controversy, which is situate in the Virginia military reservation, in the State of Ohio, on an entry made on a Virginia military land warrant, in the name of Robert Means, assignee, on the 23d of November, A. D. 1822, followed by a survey of said entry made in the name of the said Robert Means, assignee, on the 18th of March, A. D. 1823; which said Robert Means before said entry, and as early as the year A. D. 1808, had departed this life. And that, on

the 4th day of April, 1825, another patent for the same tract of land was issued to one James Galloway, on an entry thereof, made in the name of said Galloway, on the 10th of December, A. D. 1824, on another Virginia military land warrant, and which was duly surveyed in his (said Galloway's) name, on the 15th of the same month of December, A. D. 1824, and which tract of land was subsequently conveyed by said Galloway to said Walter Dun. Upon which said state of facts, touching the titles of the said parties to said tract of land, this point was raised by the counsel for the complainant in said bill of review, upon the hearing and argument thereof, viz: "Whether the said location and survey of said tract of land in the name of said Galloway, and the patent issued to him for the same, are not null and void, as being made and done in contravention of the proviso to the second section of the act of Congress of the 1st of March, A. D. 1823, entitled "An act extending the time for locating Virginia military land warrants and returning surveys thereon to the General Land Office."

And upon the point so as aforesaid raised by the counsel for the complainants in review, the opinions of the judges of this court being opposed, the said point of disagreement is, on motion of said complainants' counsel, stated as above, under the direction of said judges, and is hereby ordered to be certified to the Supreme Court of the United States at its next session to be hereafter holden, for its final decision upon said point of disagreement; and this cause is continued.

The UNITED STATES OF AMERICA,
District of Ohio, ss:

I, William Miner, clerk of the circuit court of the United States within and for the 7th circuit and district of Ohio, do hereby certify the foregoing to be a correct copy of the proceedings had in said court in a cause between Allen McArthur and others, heirs, &c., of Duncan McArthur, deceased, complainants, and the heirs of Walter Dun, deceased, defendants, as the same appears on the journals and files of said court.

In testimony whereof, I have hereunto subscribed my name and [L. S.] affixed the seal of said circuit court, the 9th day of September, anno domini 1845.

Attest: WM. MINER, *Clerk*.

Filed 29th Nov., 1845.